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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1963

No. 600

ARCHIE A. WHITE,

Respondent,

vs.

WARD LANE, as Warden of the Indiana State Prison,

Petitioner.

Respondent's Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PORTER R. DRAPER,
607 Broadway,
Gary, Indiana,
883-8505,
Attorney for Respondent.

HODGES, RIDGELY, DAVIS, GRUENBERG & DRAPER,
JOSEPH E. COSTANZA,
Of Counsel.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

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THE OPINIONS BELOW

The applicable opinions in the courts of inferior jurisdiction fully appear in the Petition for Writ of Certiorari.

JURISDICTION

The statute relied upon to confer jurisdiction upon the Supreme Court of the United States is set forth in the Petition for Writ of Certiorari. However, that statute is

qualified by Rule Nineteen (19) of the Rules of the Supreme Court of the United States impowering that Court to reject the said Petition in the exercise of sound judicial discretion.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, RULES AND STATUTES INVOLVED

The following Constitutional and Statutory Provisions and Rules are intended to supplement those contained in the Petition for Writ of Certiorari.

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."
>
> Rule 19 (1), (b) Rules of the Supreme Court of the United States.

"An appeal to the Supreme Court or to the Appellate Court, may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein, and, upon the appeal, any decision of the court or intermediate order made in the progress of the case may be reviewed."

Ind. Acts, 1905, Ch. 169, §324, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 297, §9-2301.

"The motion for a new trial and the causes therefore shall be in writing. It must be filed within thirty (30) days from the date of the verdict or finding * * *"

Ind. Acts, 1905, Ch. 169, §282, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 244, §9-1903.

"No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin in tender of payment of debts; pass any bill of attainder; ex post facto law, or law impairing the obligation of contract or grant any title of nobility."

Article 10, §1, Constitution of the United States.

"No ex post facto law, or law impairing the obligation of contracts shall ever be passed."

Article 1, §24, Constitution of the State of Indiana.

QUESTIONS PRESENTED

Petitioner's delineation of the questions implicit in the instant case are satisfactory.

CONCISE STATEMENT OF THE CASE

Respondent accepts the statement of the case set forth in Petition for Writ of Certiorari.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY HELD INDIANA SUBSTANTIVE AND PROCEDURAL RULES DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW TO THE INDIGENT RESPONDENT

The Court of Appeals determined Respondent's rights guaranteed by the Fourteenth Amendment to the Constitution of the United States had been violated. In so doing they aptly determined a *pro se* mandatory or discretionary appeal does not equal such appeals prepared and prosecuted by counsel. Accordingly, another archaic legal fiction has been interred and should be permitted to rest. Attempted resurrection on the theory that Federal Courts lack authority to lay waste state substantive and procedural rules that deny Constitutionally guaranteed protection is without support in American jurisprudential precedent. Petitioner cites none and Respondent respectfully suggests none are available.

Respondent was convicted of the crime of incest and incarcerated. (A. p. 4) (All references to the record will be to Respondent's Appendix as filed in the Court below, copies of which were filed with the Petition for Writ of Certiorari. Reference to the Petition will appear as Pet. p. ....)

Irrespective of economic means, all persons convicted of a crime in Indiana are statutorily granted a right to appeal from that conviction.

Ind. Acts, 1905, Ch. 169, §324, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 297, §2301

Despite the request and assurance given to respondent, the Trial Court appointed pauper attorney failed to prosecute such an appeal (A. p. 9) within the thirty (30) day period provided for the filing of a motion for a new trial.

Ind. Acts, 1905, Ch. 169, §282, p. 584; 4 Burn's Ind. Stat. Anno. Pt. 1, 244 §9-1903.

The pauper attorney's determination not to appeal is unreviewable in the State of Indiana.

> "We must, therefore, assume that competent counsel assigned for trial would have filed a motion for a new trial if meritorious grounds therefore had existed, since such was his duty.
>
> Under the law of this state it is part of the duties of trial counsel whether representing a pauper defendant or not, to file a motion for a new trial if such counsel feels that there is meritorious grounds for a new trial and an appeal. In other words, trial counsel may not, upon the rendition of a verdict of the finding of guilty, walk out of the court room and shed himself of all responsibility with reference to the rights of his client, if, IN HIS OPINION, (Our Emphasis) the trial court has committed error which may be the basis for the motion for a new trial. We have no right to assume competent counsel would disregard such duty." *State ex rel Macon v. Orange Circuit Court*, __ Ind. __, 185 N.E. (2) 619, 621 (1962).

Consequently, Respondent was denied a mandatory appeal as a result of the failure of court appointed counsel to proceed. He had no control of that counsel whatsoever. Neither do the Indiana courts.

If mandatory appeal time expires, all convicted persons may seek a belated appeal as provided by statute.

Ind. Acts, 1947, Ch. 189, §5, p. 625; 4 Burn's Ind. Stat. Anno. Pt. 1, 375, §9-3305.

That remedy is patently discretionary with the Supreme Court of Indiana and subject to such rules as it may adopt or orders it may issue in a particular case.

The Court adopted no rules prior to the instant case. However, it had published written opinions requiring indigent convicted persons and only such poor persons to obtain legal assistance from the Public Defender as a condition precedent to prosecution of a belated appeal.

> "Petitioner's remedy, if he has one, is not through this Court, but the Office of the Public Defender, who is authorized by statute to furnish transcripts and act as pauper counsel in proper cases where appeal is taken after the regular time has expired." *Mooney v. State*, 239 Ind. 705; 187 N.E. (2d) 481 (1959).

However, the Public Defender may refuse to act as counsel and such a decision is unreviewable.

> "The Public Defender is not required to represent any person whose assertion that he is unlawfully in prison after the investigation, appears in his sound judgment to have no merit." *State ex rel Casey v. Murray*, 231 Ind. 74; 106 N.E. (2d) 911 (1952).

Respondent sought the aid of the Public Defender pursuant to that directive of the Supreme Court of Indiana. It was refused.

> "We shall return your transcript to trial to you; this office can do nothing for you."
>
> Letter to Respondent from Office of Public Defender, dated July 16, 1957 (A. pp. 13, 14).

A subsequent request that the trial court appoint a counsel was denied and an appeal to the Supreme Court of Indiana from that denial was dismissed. (Both Petitioner and Respondent are unable to find the report of that dismissal. See Pet. p. 13).

The reason for that dismissal was explained to Respondent by the then Chief Justice of the Supreme Court of Indiana, as follows:

> "In reply to your letter of April 24, your Petition was denied on April 10, for the reason that you had not complied with Rules 2-5 and 2-6 of this Court and for the further reason that the services of the Public Defender of Indiana are available to those prisoners who are unable to pay the cost of post-conviction legal procedures in all cases where there is merit to the appeal.
>
> If you are acting as your own lawyer you must abide by the Rules of Court the same as any other litigant."
>
> Letter of Chief Justice Arch N. Bobbitt to Respondent, dated April 27, 1961 (A. p. 14).

Therefore, Respondent was twice thwarted by indigency and indigency alone from prosecuting a mandatory or discretionary appeal.

A non-indigent can compel prosecution of a mandatory appeal. An indigent cannot. A non-indigent is not required to obtain the assistance of the Public Defender to prosecute a belated appeal. An indigent must. A non-indigent may employ any attorney to conduct a belated appeal. An indigent must abide by the unreviewable decision of the Public Defender and if assistance is withheld his only alternative is to proceed *pro se*.

Following complete briefing and oral argument, the Court of Appeals correctly held Respondent's Constitutional rights had been infringed. It then mandated his release if an appeal and counsel to prosecute that appeal were not furnished by the State of Indiana within a reasonable time. (Pet. 21-30).

The Supreme Court of the United States has consistently held such unreviewable determinations affecting the right to appeal granted indigents violates most fundamentally guaranteed due process and equal protection of the law.

Trial judges have been prohibited from preventing an indigent's appeal. *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; (1958); *Draper v. Washington*, 372 U.S. 47, __ S.Ct. __, 9 L.Ed.2d 698 (1963). States are forbidden to so intefere. *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 335, 100 L.Ed. 891 (1956); *Burns v. Ohio*, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959); and Public Defenders cannot restrain the right to appeal. *Lane v. Brown*, 372 U.S. 477, __ S.Ct. __, 9 L.Ed.2d 892, (1963).

These prohibitions have been specifically applied to interference with an indigent's "statutorily granted right to appeal." In *Douglas v. California*, 372 U.S. 353, 83 S.Ct. __, 9 L.Ed.2d 811 (1963) the Supreme Court of the United States held that a determination by an Appellate Court to refuse appointment of counsel on the ground such appointment would not be helpful denied an indigent's "statutorily granted right to appeal" In the opinion the Court said:

> "When an indigent is forced to run this gauntlet of a preliminary showing of merit, the right to appeal is not adequate and effective. . . . The present case, where counsel was denied petitioner on appeal, shows that the discrimination is not between 'possibly good and obviously bad cases,' but between cases where the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot. Due process and equal protection demand that the poor man have the same rights as the rich man who appeals. As to him, [where] the court [appoints] counsel to act on his appeal, [proves] the benefit of counsel's assistance to [the] court, [after] full consideration of the merits of the appeal, [or] the case is [wholly] frivolous, [and] will so state in the record,

research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."

The inevitable and proper result was the order to provide Pennell an appeal on the merits from his conviction.

The determination made by the Court of Appeals does involve an important question of Federal Constitutional Law which conflicts with the applicable decisions of the Indiana Courts. It does not, however, conflict with the decisions of the Supreme Court of the United States and neither is it such a departure by a lower Court as to call for an exercise of power of supervision in accordance with Rule 19 of Rules of the Supreme Court of the United States.

In truth the opinion of the Court of Appeals goes a long way toward bringing to fruition a statement made to Attorney General Brownell that:

> "So long as there is to be a government under and by law, we hold no doubt that the burden of prosecution is a community responsibility * * *. Equally, the burden of providing a fair trial is upon the community. The right to representation is a concomitant of fair trial, and though it is personal to the defendant and may vary with his choice and means, it cannot be permitted to fail just because the accused is a poor person. At that point the community must supply the deficiency." Representation of Indigent Defendants in Federal Cases: Hearing before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, February 17, 1954, p. 21. See also: Note 38 Ind. L. J. 623; The Indigent Defendant in the State Criminal Proceeding: *Betts v. Brady* Is Interred.

Surely, in this day and age this Court does not want to perpetuate the meaningless legal fiction that a *pro se* appeal equals an appeal prepared by counsel.

II.

INDIANA SUPREME COURT RULE 2-40A CONSTITUTES AN EX POST FACTO ENACTMENT IF APPLIED TO RESPONDENT

The Court of Appeals decision in the instant case was published July 17, 1963. The Petition for Rehearing was denied August 20, 1963.

On September 11, 1963, the Indiana Supreme Court adopted Rule 2-40A. This Rule requires that all Petitions for Belated Appeal may be reviewed only on Petition for Writ of Certiorari in the Supreme Court of Indiana. (Pet. p. 7).

Both Article X, Section 1 of the Constitution of the United States and Article I, Section 24 of the Constitution of the State of Indiana prohibits adoption of ex post facto laws. The Rules of the Supreme Court of Indiana have the force of law. *Miller v. Treacy*, ... Ind. ..., 108 N.E. (2d) 190 (1952). See also 9 West's Ind. Dig. 337-385, Operation and Effect of Rules and cases therein cited.

The Constitutional mandate applies to Rules of Court which have the effect of law.

16 A. C.J.S. 444-435, Ex Post Facto Laws, Definition and Nature.

The Court of Appeals ordered the State of Indiana to grant Respondent an appeal on the merits prior to adoption of the aforementioned Rule. Any interference with that mandate by subsequent adoption of rules prohibiting Respondent to obtain an appeal or release, would violate those Constitutional provisions.

III.

THE RECORD BEFORE THE DISTRICT COURT WAS COMPLETE AND AN APPEAL FROM ITS DENIAL OF THE PETITION FOR WRIT OF HABEAS CORPUS WAS WITHIN THE AUTHORITY OF THE COURT OF APPEALS

The initial Petition for Writ of Habeas Corpus was verified (A. pp. 3-8). All facts in verified petitions are assumed to be true as a Court interprets consequences resulting from its facts. The State of Indiana admits it did not controvert those facts (Pet. p. 16). Petitioner cites no authority prohibiting the Court of Appeals from reversing the District Court on the basis of the same record. Particularly is this true where the State admits it did not avail itself of an opportunity to controvert the Petition as verified.

CONCLUSION

Respondent prays the Petition be denied with such sanctions as this Court shall determine.

No matter how heavy the burden of providing counsel on appeal may be, the Petition fails to disclose error requiring the judicial supervision of this Court.

On the grounds set forth in this brief in opposition, the instant case should be permitted to rest undisturbed.

Respectfully submitted,

PORTER R. DRAPER,
Attorney for Respondent.

HOSKINS, RUSKAY, DAVIS, GREENBERG & DRAPER;
JOSEPH E. COSTANZA,
Of Counsel.